Supreme Court, U.S.
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No. 04-809

IN THE

Supreme Court of the United States

NORFOLK DREDGING COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,

and

BEAN STUYVESANT, L.L.C.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT BEAN STUYVESANT, L.L.C. IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Circuit properly concluded that Bean Stuyvesant, L.L.C. could lawfully charter a U.S. flag, non-hopper dredge for purposes of completing a specific contract pursuant to Section 5501(a)(2) of the Oceans Act of 1992. Pub. L. 102-587, § 5501(a)(2)(A)(iii) (codified at 46 U.S.C. App. § 292 note).

CORPORATE DISCLOSURE STATEMENT

Respondent Bean Stuyvesant, L.L.C. is a limited liability company and is 50% owned by Bean Dredging L.L.C. which is a privately held company. The other 50% is owned by Stuyvesant Dredging Company which is ultimately 100% owned by the Dutch public corporation Royal Boskalis Westminster nv.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Bean Stuyvesant, L.L.C. ("Bean Stuyvesant"), respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Federal Circuit's opinion in this case, reported at 375 F.3d 1106 (2004). Review is not appropriate because: 1) the case does not present an issue of national importance on which courts of appeals have issued conflicting decisions; and 2) the Federal Circuit

decision was correct and resulted from the sound application of statutory construction principles.

STATEMENT OF THE CASE

1. This is a bid protest action filed by petitioner, Norfolk Dredging Company, Inc. ("Norfolk"), in the U.S. Court of Federal Claims on September 25, 2003 in response to the U.S. Army Corps of Engineers ("Corps") notice that Bean Stuyvesant was the apparent low bidder on solicitation number DAW54-03-B-0011 (relating to maintenance dredging work to be performed in North Carolina). Norfolk contended that Bean Stuyvesant could not lawfully perform the contract under 46 U.S.C. App. § 292, because it is not 75% owned by U.S. citizens. Bean Stuyvesant, however, is subject to a statutory exemption from the general rule. The exemption provides in relevant part that the 75% ownership requirement of § 292 does not apply to:

> (iii) any other non-hopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; . . .

46 U.S.C. App. § 292 note (Oceans Act of 1992, Pub. L. 102-587, § 5501(a)(2)(A)(iii)). Bean Stuyvesant is a company in which Stuyvesant Dredging Company ("SDC") has an ownership interest. Bean Stuyvesant proposed chartering a dredge called the MERIDIAN for purposes of completing the Corps contract. The MERIDIAN is a non-hopper dredge which is

documented under the U.S. flag pursuant to chapter 121 of Title 46 of the U.S. Code.

The Court of Federal Claims granted Norfolk's protest finding that:

> An arrangement would satisfy this part of the exception only if the chartered non-hopper vessel "is necessary . . . to fulfill dredging obligations under a specific contract," supplementing a hopper vessel documented as of 1992, "including any extension periods," or to complete temporary replacement of a hopper or non-hopper performing a hopper contract.

Norfolk Dredging Company, Inc. v. United States, Pet. App. 40a (ellipses in original).[1]

The Federal Circuit unanimously reversed, holding that:

> The Court of Federal Claims' interpretation erroneously adds conditions not present in the statutory language. Neither the plain language of exception (A)(iii) nor the structure of the three exceptions pertaining to SDC provides any basis for the court's conclusion that non-hopper dredges could only be used in a supplemental or replacement capacity to fulfill contracts expressly calling for the services of the vessel STUYVESANT or other hopper vessels documented as of 1992. If Congress had intended these additional restrictions, it could easily have added express language to that effect.

Norfolk Dredging Company, Inc. v. United States et al., Pet. App. 9a. Norfolk's petitions for rehearing and rehearing *en banc* were denied on August 13, 2004.

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[1] The decision was initially published at *Norfolk Dredging Company, Inc. v. United States*, 58 Fed. Cl. 167 (2003). A corrected version was later issued at *Norfolk Dredging Company, Inc. v. United States*, 58 Fed. Cl. 741 (2003).

2. In accordance with the Federal Circuit's decision, the Corps reinstated the contract award to Bean Stuyvesant on August 26, 2004. Contract work involving the MERIDIAN was completed in January 2005.

3. The petition contains numerous misstatements of fact and law with respect to the origins, purpose, policy, and effect of the dredging statute and its exceptions, other cabotage laws, and the operations, structure, and effect of Bean Stuyvesant. These matters have been discussed at some length in the proceedings below and to the extent relevant disposed of in the Federal Circuit's decision.

REASONS FOR DENYING THE PETITION

Norfolk maintains that the narrow question of statutory interpretation presented requires this Court's review, because it "presents a question of great practical importance to the domestic maritime commerce" (Pet. 11) and because "the Federal Circuit reached this result through the use of an analysis that cannot be reconciled with the approach to statutory construction that is mandated by this Court and followed by other courts of appeals" (Pet. 12). Norfolk is wrong for the following reasons.

1. The petition does not present an issue of national importance. The sole question presented involves the plain meaning of a statutory exception with limited applicability and duration. The portion of the exemption at issue involves only SDC and companies in which SDC has an ownership interest (which consists solely of Bean Stuyvesant); the specific subparagraph at issue involves only non-hopper dredges documented under the U.S. flag that are chartered to SDC or Bean Stuyvesant for use on specific projects; and the exemption has a finite duration, expiring in 2022.

In addition, while Norfolk claims the Federal Circuit's decision has important ramifications, it has cited no basis for the litany of hypothetical and entirely speculative evils that it alleges could result from the ruling. There is no support

whatsoever in the record or in fact for the supposed competitive advantages or impacts listed by Norfolk (Pet. 13-15). Nor is there any reason to believe the outlandish claim that SDC (which is a U.S. entity owned by a Dutch company) or Bean Stuyvesant (which is a U.S. entity with equal U.S. and Dutch citizen ownership) pose any threat to national security as a result of having all or partial Dutch ownership as suggested by Norfolk (Pet. 12-13).

The Federal Circuit's decision did not provide a new or broader interpretation of the exemption than previously existed. It maintained the *status quo* by relying on the plain meaning of the statute. U.S. Customs and Border Protection has administered the dredging statute and other U.S. cabotage laws for many decades; and it has consistently interpreted the dredging statute in accordance with the same plain meaning. As such, SDC's operating authority has not been expanded in any way by the Federal Circuit's decision. It will simply be able to continue to operate as it has since the statute's enactment in 1992 until the exemption expires in 2022.[2]

In addition, Norfolk acknowledges the lack of a conflict between circuit courts but claims that such a conflict is not necessary on the grounds that "due to the vagaries of the Federal Circuit's jurisdiction, no circuit split ever can develop on the meaning of the provision" (Pet. 15-16). Norfolk is, however, incorrect in its assumption that the Federal Circuit has exclusive jurisdiction over the statute in question. This case did not arise under the Tariff Act like the question in *United States v. Mead Corp.*, 533 U.S. 218 (2001) relied upon

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[2] SDC has operated in the United States since 1980. Prior to 1992, it had broader operating authority and was able to compete on equal footing with U.S. companies. As a result of the 1992 legislation, SDC's pre-existing operating rights were largely preserved. However, under the exemption, SDC, as well as Bean Stuyvesant, is subject to certain limitations in how it operates. These limitations were discussed in the Federal Circuit's decision.

by Norfolk. The matter was appealed to the Federal Circuit solely because Norfolk chose to challenge the statute via a bid protest rather than through typical judicial review procedures.

2. The Federal Circuit's decision is correct. Norfolk contends that in reaching its decision the Federal Circuit failed to follow well accepted principles of statutory construction. The Federal Circuit actually relied primarily on the most commonly accepted principle of statutory construction: adherence to the plain language of the statute. As the court stated:

> Statutory interpretation begins with the language of the statute. *Williams v. Taylor*, 529 U.S. 420, 431, 120 S. Ct. 1479, 146 L.Ed.2d 435 (2000). A court derives the plain meaning of the statute from its text and structure. *Alexander v. Sandoval*, 532 U.S. 275, 288, 121 S. Ct. 1511, 149 L.Ed.2d 517 (2001). If the language is clear and fits the case, the plain meaning of the statute generally will be regarded as conclusive. *Sullivan v. Stroop*, 496 U.S. 478, 482, 110 S. Ct. 2499, 110 L.Ed.2d 438 (1990); *see also VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579-80 (Fed. Cir. 1990) (noting that unambiguous statutory language controls, unless legislative intent is clearly contrary or when its application produces a result so unlikely that Congress could not have intended it). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L.Ed.2d 391 (1992).
>
> The language of the statute at issue in this case is clear and unambiguous, and absent extraordinary circumstances our inquiry must end here. *See VE Holding*, 917 F.2d at 1580. Thus, it is unnecessary to seek clarification in the admittedly sparse legislative history. *See*

Norfolk II, 58 Fed. Cl. at 756 ("The legislative history is limited").

Norfolk Dredging, Pet. App. 6a-7a. The Federal Circuit clearly did not deviate from the well accepted rules of statutory construction as Norfolk contends.

CONCLUSION

For all of the reasons above, Respondent Bean Stuyvesant, L.L.C. respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted.

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